stitutionality of this mode of assessing the personalty in question it is answered that the State may provide the method for assessing a new species of property, created for the purpose of taxation.[14] Nor are the provisions of the federal constitution violated since nothing is exacted from the owners of special franchises which is not exacted from owners of property, generally.[15] State control over structures in the highway would seem to follow from the recognized right of the legislature to control the highway itself.[16] No method for valuing special franchises was provided by the legislature. However, this omission does not constitute a failure of due process of law for the statute must be construed to be a part of the general tax law.[17] Whether such a method can be supplied *aliunde* is more doubtful. In a recent case, *People ex rel. Jamaica Water Supply Co.* v. *State Board of Tax Commissioners* (N. Y. 1909) 89 N. E. 581, the Court of Appeals sanctioned, for that case, the "net earnings" rule. From the gross earnings, operating expenses, including an allowance for depreciation, taxes, and a fair return on the capital invested in real and tangible personal property are to be deducted. The residue capitalized at a fair rate gives the value of the special franchise.

Theoretically this residue of the net earnings is not solely attributable to the special franchise,[18] although this objection is scarcely insuperable. But further, it is not clear that the value of the corporate franchise is not included since the value of a special franchise may depend upon the earning capacity of the corporation owning and exercising it, as a going concern.[19] This rule, too, seems inapplicable to telephone and telegraph companies, a large part of whose earnings results from messages sent to, and received from points outside the state. The court, however, does not attempt by judicial legislation to supply the omission of the legislature by declaring the above to be the established rule for all cases; its inapplicability in cases in which it would work injustice is expressly recognized. The resulting undesirable uncertainty, however, can apparently be avoided only by legislation.

PLEADING THE STATUTE OF LIMITATIONS TO A FEDERAL INDICTMENT FOR CONSPIRACY.—In criminal practice the federal courts follow the principles of the common law as it existed in the states at the time of the adoption of the constitution.[1] For pleading the statute of limitations to an indictment several methods seem available. It has been held that this defense may be raised by general demurrer,[2] and this method has been used where the lapse of the statutory period was apparent on the face of the indictment. It has not, however, been much approved in the federal courts due, doubtless, to the fact that, though from the face of the indictment the limitation period may seem to have passed, exceptions to its running, not there set

[14]Buffalo Gas Co. *v.* Volz (N. Y. 1900) 31 Misc. 160.

[15]People *ex rel. v.* Tax Com'rs. (1903) 174 N. Y. 417.

[16]People *v.* Flagg (1871) 46 N. Y. 401.

[17]People *ex rel. v.* N. Y. (1904) 199 U. S. 48.

[18]Union Pac. R. R. Co. *v.* U. S. (1878) 99 U. S. 402, 420.

[19]People *ex rel. v.* Barker (1897) 152 N. Y. 417.

[1]U. S. *v.* Reid (1851) 12 How. 361; Erwin *v.* U. S. (1889) 37 Fed. 470, 488; U. S. *v.* Nye (1880) 4 Fed. 888.

[2]U. S. *v.* Watkins (1829) 3 Cr. C. C. 441, 550.

forth, may have prevented the bar.[3] The approved practice in federal courts prescribes the "general issue,"[4] under which this defense may be raised; or a special plea.[5] This special plea, sometimes considered in the nature of a plea in abatement,[6] seems properly to be one of substantive matter in absolute bar of the prosecution.[7]

May two pleas, one of them the statute of limitations, be entered to an indictment? To urge two different matters in defense does not seem objectionable in itself. The machinery of the courts is adequate to meet the situation. This is instanced by the common practice of entering more than one plea in criminal cases generally,[8] despite the fact that such action has been thought permissible only in cases of felonies.[9] Thus, the use of two pleas in abatement in misdemeanors is now countenanced[10] and it is also recognized that where there are two distinct grounds of defense in bar, each set up in a separate plea, a proper decision upon the facts may be secured by leaving to the jury the whole matter, after an explanation by the court of the rôle of each plea.[11] When, however, both defenses are incorporated into a single plea the rule against duplicity is encountered. A plea may not contain allegations as to two distinct matters either of which would form a good defense to the indictment.[12] Advantage of such a defect of form in criminal procedure, it would seem, is taken by general demurrer.[13] Duplicity, however, is not altogether inhibited where no practical injustice results. Although in general a count in an indictment must be limited to a single offense, nevertheless, if two offenses are of such a nature that when both are committed they constitute a single legal offense and one includes the other, both may appear in the same count.[14] Instances are found in the combination of breaking and entering to commit larceny, with its commission;[15] also in the joining of assault and battery.[16]

In a recent federal case, *U. S.* v. *Kissel et al.* (C. C., S. D. N. Y. 1909) 173 Fed. 823, an indictment under a statute charged a conspiracy

[3]U. S. *v.* Andam (1906) 158 Fed. 996; U. S. *v.* Brace (1906) 143 Fed. 703.

[4]U. S. *v.* Cook (1872) 17 Wall. 168; Hatwood *v.* State (1862) 18 Ind. 492.

[5]U. S. *v.* Brown (1873) 2 Low. 268.

[6]U. S. *v.* Brace *supra.*

[7]U. S. *v.* Brown *supra.*

[8]U. S. *v.* Richardson (1886) 28 Fed. 61; State *v.* Greenwood (Ala. 1837) 5 Port. 474.

[9]1 Chitty, Criminal Law 434; State *v.* Reeves (1888) 97 Mo. 668; Reg. *v.* Charlesworth (1861) 9 Cox C. C. 40.

[10]U. S. *v.* Richardson *supra;* U. S. *v.* Reeves (1878) 3 Wood C. C. 199; State *v.* Greenwood *supra.*

[11]State *v.* Hudkins (1891) 35 W. Va. 247; Pritchford *v.* State (1877) 2 Tex. App. 69.

[12]Nauer *v.* Thomas (Mass. 1866) 13 Allen 472; *cf.* U. S. *v.* Richardson *supra.*

[13]U. S. *v.* Patterson (1893) 59 Fed. 280; U. S. *v.* French (1893) 57 Fed. 382; Lazier *v.* Comw. (Va. 1853) 10 Gratt. 708.

[14]Comw. *v.* Squires (1867) 97 Mass. 59; State *v.* Dearborn (1857) 54 Me. 442.

[15]Comw. *v.* Tuck (Mass. 1838) 20 Pick. 356.

[16]State *v.* Inskeep (1892) 49 Oh. St. 228.

and a series of overt acts done to effectuate it. This statute provided that a conspiracy could not be prosecuted unless an overt act in furtherance thereof had been committed.[17] The defendant filed a special plea in bar, pleading the statute of limitations against some of the acts, and non-participation in those committed within the statutory period. This plea was sustained on demurrer, without comment as to its form. The question of its duplicity may arise under either of the two theories which now exist in the federal courts concerning the nature of such a conspiracy. One view deems the conspiracy complete upon the commission of the first overt act; later acts merely aggravate the offense.[18] Under this view the first overt act would start the statute of limitations running and subsequent acts would have no effect. Accordingly, that portion of the plea entered in the principal case which sets up the statute would be a complete defense to the first overt act and so to the whole crime. There would then be no duplicity, for the remainder of the plea would apparently be mere surplusage and so negligible.[19] The other view considers each overt act as a renewal of the conspiracy. This permits the offense to be charged as of the time of any such act.[20] Since the offense is of such a peculiar nature, it may be spoken of as divisible. In such a case it may well be said that no single denial will completely answer the whole charge so that several denials are necessary. And, although it is said a prisoner must "confess or deny all," there is authority that he should be allowed to plead special matter to a part of the offense and guilty or not guilty to the residue.[21] Such a plea would not be open to the objection of duplicity. Accordingly, the plea in the principal case seems proper whichever view of the nature of the crime of conspiracy is adopted.

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[17]U. S. R. S. § 5440.

[18]U. S. *v.* Owens (1887) 32 Fed. 534; U. S. *v.* McCord (1895) 72 Fed. 159.

[19]U. S. *v.* Burnham (1816) 24 Fed. Cas. No. 14690.

[20]Jones *v.* U. S. (1908) 162 Fed. 417; U. S. *v.* Bradford (1905) 148 Fed. 413; Lorenz *v.* U. S. (1904) 24 D. C. App. 334, 388.

[21]Nauer *v.* Thomas *supra;* Bishop, New Crim. Proc. § 794, a, 2.